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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1413

LITTLE RIVER MARINE CONSTRUCTION CO., INC.,
Petitioner,

versus

ALBERT FLAKSA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The respondent, Albert Flaksa, files this brief in opposition to the petition for writ of certiorari heretofore filed in this Court.

The petitioner, Little River Marine Construction Co., Inc., seeks review of a judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reversing a

NOTE: All Emphasis Supplied.
R.: Record on Appeal.
P.: Petition for Writ of Certiorari.

judgment or decree of the United States District Court, Southern District of Florida, which, in a limitation of liability proceeding instituted by the petitioner, (1) dismissed with prejudice the respondent's claim for personal injuries, and (2) struck his answer to the petitioner's petition for exoneration from, or limitation of, liability and exempted and discharged the owner from all loss.

The stated ground of the final judgment or decree of the District Court was the failure of the claimant and his proctors to prosecute his claim with "reasonable diligence" and to abide by certain discovery and pre-trial rules of the Court (R. 144-146, 197; P. 14-16). The final decree was entered only slightly over nine months after the cause was commenced, and just shortly beyond a year after the respondent was burned in the flash-fire accident involved (R. 1-7, 146, P. 13).

In a carefully reasoned opinion, the Fifth Circuit reversed, 389 F.2d 885.

I

OPINIONS BELOW

District Court: Opinion contained in Final Decree, Appendix B to the petition for writ of certiorari, pages 14 through 17 of the petition; not reported.

Fifth Circuit: Opinion, 389 F.2d 885, contained in Appendix A to the petition for writ of certiorari, pages 7 through 13.

Briefly stated, the trial court found the following derelictions and failures which it claimed supported its dismissal for want of prosecution with reasonable diligence:

(a) Failure of respondent to timely answer interrogatories (R. 50, 144; P. 15);

(b) The failure timely to respond to the ten day order granting motion to produce medical bills and tax returns from the year 1960, which order was dated and filed September 11, 1964 (R. 66-67; 144; P. 15);

(c) Failure of the proctor for the respondent to meet with proctor for the petitioner to prepare a pre-trial stipulation on October 12, 1964, or prior to October 19, 1964, the original date set for pre-trial (R. 144-145; P. 15-16);

(d) The failure of one of the proctors for the respondent to appear at a renewed pre-trial on October 30, 1964, notice of which had been given the day before (R. 145-146; P. 15-16).

The Fifth Circuit Court of Appeals in reversing, noted derelictions of counsel, chastised him, and then in view of the circumstances of the case, stated in relevant part as follows:

> "It is well established that the District Court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable diligence or to comply with its orders or rules of procedure. While the authority is reiterated in

some of the Federal Rules of Civil Procedure for particular situations, the power is one inherent in the court 'in the interest of the orderly administration of justice'. It may be exercised *sua sponte* under proper circumstances. The exercise of the authority is discretionary, and is subject to review for abuse of discretion. Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations, as the court has a wide range of lesser sanctions. These rules are applicable to Admiralty proceedings." (389 F.2d 885, et seq., P. 9-11, citing cases). (Emphasis theirs).

The Fifth Circuit then clearly recognized the *power* of the court to impose this sanction in certain circumstances but added:

"This Court, while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases, has adopted the view that such action is too harsh except in extreme circumstances. It has generally followed the more modern tenor appearing in the following quotation from the opinion in the recent case of *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, where Judge Wisdom, after recognizing the inherent power now under discussions, said: ' . . . The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff. . . .'." (389 F.2d 885, et seq.; P. 11).

The Fifth Circuit was of the opinion that there were lesser sanctions which could and should have been imposed here, short of final dismissal, under the circumstances, and listed various of them with particularity. These included 1) reprimand of the attorney; 2) contempt adjudication; 3) prohibition against practicing for a limited time before the court whose order was neglected. (P. 11-12). The Court concluded as follows:

> "We are convinced that the able trial judge was more than patient under the circumstances, but we feel that he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him. Since this was apparently a single claim limitation proceeding, striking the appellant's claim and answer left the petition for limitation undenied which in turn results in the Court in effect granting exoneration and denying privity, either or both of which are frequently formidable issues for the shipowner. *This proceeding was filed only a short time after the occurrence of the flash fire that gave rise to it, and it was less than a year old at the time it was dismissed.* There was no indication that the appellant's claim was vexatious or fictitious. The admitted delay was not so long drawn out as to indicate a desire not to prosecute. The appellant was in no way connected with or responsible for his proctor's dilatory conduct. *While we do not condone that conduct, we feel that the circumstances of the case are not such that the appellant should lose his day in court.*" (P. 12-13). (Emphasis supplied).

II

QUESTION PRESENTED

The respondent disagrees with the question presented as framed in the petition (P. 2). Rather the question here is simply: Whether the Court of Appeals appropriately reviewed for abuse of discretion the harsh sanction of dismissal and striking of pleadings, and entry of final adverse decree imposed by the District Court for want of reasonable diligence in prosecution of the claim, and failure of counsel to abide by certain pre-trial orders, upon the unique facts presented.

III

STATEMENT

The Fifth Circuit Court of Appeals found various derelictions by counsel, and called him to task for them, but nevertheless found an abuse of discretion in the harsh sanction imposed by the trial court under the circumstances, just over nine months after the litigation commenced and only little more than a year after the occurrence of the flash fire involved (R. 1-7, 46; P. 13). The following is a review of the record actually before the courts below, with reference to the reasons stated by the District Court in imposing and adhering to the ultimate final sanction:

a. Untimely answers to interrogatories

1. Complete answers to the petitioner's interrogatories were filed perhaps two weeks beyond the date pro-

vided for in the rules (R. 59-66). These answers were filed on August 19, 1964, two months earlier than the scheduled pre-trial (R. 40). No order to compel answers was filed or required.

2. Virtually, all of the information which had been sought in the interrogatories was already in the hands of the petitioner prior to the time they were filed. A complete discovery deposition inquiring into subject matter sought in the interrogatories of the petitioner had been taken on March 18, 1964 (R. 67-137).

3. The petitioner had full knowledge of the respondent's earnings and, for the most part, his medical expenses incurred and paid by the Workmen's Compensation carrier, inasmuch as the respondent had been employed by the petitioner for a period of five years prior to the date of the accident and, indeed, was injured in the course of employment (R. 63, 76, 106, 115, 117-118, 175).

b. Delay in producing medical bills and tax returns

1. The record clearly reveals that the delay in producing the medical bills was caused by a recalcitrant physician and not by the respondent (R. 181-183).

2. The petitioner, respondents' employer, had full knowledge of the respondent's income for the years covered by the returns long before their production. Statements of income had been furnished in the answers to the interrogatories and the petitioner-employer was well aware of just what the respondent had been earning (R. 63).

3. Moreover, the petitioner had knowledge of the medical bills incurred as a result of the accident up to the date of the answers to interrogatories (R. 64-65), and, as an employer, had access to bills for accident connected treatment. No prejudice or undue delay of trial could be found because of the delay in furnishing repetitious information.

c. Failure of respondent's proctor to meet with petitioner's proctor to prepare pre-trial stipulation prior to October 19, 1964

1. The local practice imposed upon the proctor for the petitioner, as well as the proctor for the respondent, the affirmative duty to seek a date to discuss a pre-trial stipulation. The pre-trial stipulation, under the pre-trial order, was due on October 9, 1964 (R. 41, 42-44).

2. The first telephone call that was made by any attorney with regard to the stipulation was made by the proctor for the respondent to the proctor for the petitioner on October 12, 1964 (R. 144, 168). At that time, both attorneys already were in default and the respondent's attorney pointed out that he could not then meet because of a heavy trial schedule (R. 169-170). Thus, if any dereliction there was, it was on the part of the proctors for both parties and both appeared on October 19, 1964, without a pre-trial stipulation.

3. It is true that the respondent's motion to continue the pre-trial was denied as was his request for further discovery, and that this was justified. The Court's order of November 2, 1964, reflecting its disposition of matters presented on October 19, 1964, indicated that a new date

would be set for filing of the pre-trial stipulation (R. 142) and its records of the October 19 conference state that the pre-trial itself was to be re-set on short notice (R. 157). At this point, the dereliction, if any, was traceable to the petitioner's proctor to at least as great an extent as the respondent's particularly in view of the local custom imposing upon the proctor for the petitioner, who had instituted the limitation proceedings, the initial responsibility for arranging the conference with his adversary to prepare the pre-trial stipulation (R. 174).

d. Failure of one of respondent's proctors to appear at a renewed pre-trial on October 30, 1964

1. The pre-trial order called only for the presence of an attorney fully knowledgeable as to the facts and with full authority to act (R. 41-42). The petitioner's co-proctor did in fact appear on October 30, 1964, upon one day's notice, for the pre-trial which had been reset pursuant to the court's order. The record clearly reveals that he was fully empowered to act and actually possessed a proposed detailed and complete pre-trial stipulation (R. 163-167).

2. The absence of the *other* co-proctor in no way violated the pre-trial order of the court. Moreover, between October 19th and October 30th, again no effort had been made by the proctor for the petitioner to contact the proctors for the respondent to agree on a pre-trial stipulation (R. 170-171).

3. At the October 30 pre-trial, the proctor for the petitioner likewise came with a proposed pre-trial statement. Thus, a full pre-trial could have been had on October 30, 1964, and the proctor for the respondent was at

that time prepared to pre-try the case on that date and to try the case at any time fixed by the court (R. 159-160, 163-169, 172).

4. Moreover, on October 30, 1964, no new date for filing of the stipulation had been set pursuant to the court's order indicating that it would reset the date for such filing (R. 142)

5. The record clearly demonstrates that the respondent stood ready, willing and able to proceed to *trial of the case.* There was no *wilful* misconduct and there would have been no delay in the trial of the cause had the matter not been dismissed (R. 169). No bad faith or wilful neglect was demonstrated (R. 169-170).

IV

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There simply is no conflict of this decision (389 F.2d 885) with other decisions of other Circuit Courts of Appeal on the same issue; nor is there any conflict with any prior decisions of this Court; nor was any grave or important question involving Federal law or procedure presented or passed upon; nor was any departure from accepted standards of judicial procedure demonstrated; and thus no writ of certiorari should issue here. (See Rules of United States Supreme Court, Rule 19). All that was involved in the Fifth Circuit was a review for abuse of discretion, and a finding of such, under a unique set of circumstances; and the reinstatement of an innocent admiralty claimant's cause, which had been dismissed—prior

to the claimant's day in court—for certain conduct of his counsel. The Fifth Circuit, properly reviewing for abuse, found the sanction too severe under the circumstances. Thus, there is no reason at all for this Court to take jurisdiction of the matter.

Throughout its opinion, the Court of Appeals *recognized the power* of the trial court under appropriate circumstances to dismiss with prejudice, in its discretion (reviewable for abuse), for lack of prosecution or neglect of court orders by counsel, on the authority of *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386; but the Court also held that in the circumstance of this case, there was an abuse of discretion, no such action was warranted, and a sanction so harsh in nature should not have been imposed.

The Court ruled that under the facts here, and since the litigant was not a participant in the fault, the sanction finally depriving him of his day in court should have been a last resort only, and other lesser sanctions imposed.

The cases cited by the petitioner are readily distinguishable because of the gross derelictions involved. They involve totally different factual backgrounds. They uniformly hold, however, that the power and discretion to dismiss for failure to comply with pre-trial orders *is* subject to review for abuse. They demonstrate the extreme type of situation—absent here—which supports the ultimate sanction.

1. In *Hicks v. Bekins Moving & Storage*, 9 Cir. 1940, 115 F.2d 406, the case had been called for assignment sixteen times between December 30, 1937 and November 7,

1939. At the call on November 7, 1939, no representative for the plaintiff appeared. Thus, final dismissal with prejudice was warranted.

2. In *Jameson v. DuComb*, 7 Cir. 1960, 275 F.2d 293, the plaintiff moved for a continuance on the *trial date* upon the grounds that the plaintiff himself was engaged in guiding big game hunts in Alberta and could not be available. The court held that the plaintiff, who had instituted the action, should have been available for trial and his non-appearance justified final dismissal.

3. In *Janousek v. French*, 8 Cir. 1961, 287 F.2d 616, the plaintiff and his counsel failed to appear at the trial after a motion for continuance, itself invalidly made, had been denied. Final dismissal resulted.

4. In *Joseph v. Norton Co.*, 2 Cir. 1959, 273 F.2d 65, the trial attorney refused to proceed with his case contending that his assistant, who was the attorney of record, was ill. There was absolutely no showing that the trial attorney required any aid or that he could not go forward. Final dismissal was justified.

5. In *Link v. Wabash R.R. Co.*, 370 U.S. 262, 82 S. Ct. 1386, the plaintiff's attorney telephoned the court that he would not be available for the pre-trial on the date scheduled. The case was *six years old* and the oldest on the trial court's calendar. The entire record showed a history of dereliction and delay which justified a finding of deliberate procrastination or inexcusable neglect. The United States Supreme Court held that the trial court had the discretion to dismiss with prejudice in such a gross situation.

6. In *Payne v. S. S. Nabob*, 3 Cir. 1962, 302 F.2d 803, the court merely held that theories of liability advanced at the pre-trial limited the plaintiff, and witnesses not listed in the pre-trial memorandum could not be used.

7. In *Agnew v. Moody*, 9 Cir. 1964, 330 F.2d 868, 871, a plaintiff suffered a dismissal of his complaint with twenty days' leave to file an amended complaint. Two and one-half months beyond the twenty days allowed elapsed, and no amended complaint was filed. The trial court dismissed and, on appeal, the Ninth Circuit held that under the circumstances of the case, this exercise of discretion or power was proper.

8. In *Deep South Oil Co. of Texas v. Metropolitan Life Ins. Co.*, 2 Cir. 1962, 319 F.2d 933, the plaintiff did not appear at three calendar calls after the cause was two years old. A sixty day order was entered; but plaintiff obtained an extension to prepare. Several more extensions or continuances were sought and obtained. Counsel withdrew, the plaintiff sought to put the case over for a substantial time; new counsel appeared and said he needed substantial time, and that a few days would not suffice. The cause was dismissed after four and one-half years of delay. The dismissal, under such circumstances, properly was affirmed.

9. In *Diapulse Corp. of America v. Curtis Publishing Co.*, 2 Cir. 1967, 374 F.2d 442, the Second Circuit, in reviewing for an abuse of discretion, found none. There, in a libel suit, the plaintiff simply refused and failed to obey a discovery order as to matter which was the gravaman of the case. Over a period of months, the plaintiff's president just failed wilfully and flagrantly, as the trial court

found, to abide by the production order. Moreover, there was an extreme history of disappearance, misplacing and "losing" of documentary evidence, and other evasions and dilatory tactics. Dismissal was affirmed, under the flagrant facts there, against a challenge of abuse of discretion.

10. In *Estava v. The House of Seagram, Inc.*, 7 Cir. 1963, 314 F.2d 829, the case was dismissed with prejudice after it had been pending for no less than six and one-half years. When the case finally did come to trial, the plaintiff simply was not ready and during the first day of trial could not testify because of claimed effects of a toothache; then simply failed to show up at the scheduled hour the following day. Obviously, dismissal was warranted and properly affirmed.

11. In *Fitzsimmons v. Gilpin*, 9 Cir. 1966, 368 F.2d 561, the plaintiff disregarded local rules and did not have local counsel appointed and did absolutely nothing for a period of over fifteen months, despite the applicable one-year failure to prosecute rule. There was no showing for the delay. The case just sat. Dismissal as a proper exercise of discretion was affirmed.

12. In *Jones v. Uris Sales Corp.*, 2 Cir. 1967, 373 F.2d 644, the Court struck the defendant's answer for failure to abide by orders of court. The president and principal of the defendant company failed to show up at a deposition; and repeatedly and flagrantly, for a period of nearly a year, avoided court orders and did not produce *available* and relevant materials. Under such circumstances, no abuse of discretion could be found in resulting dismissal.

13. In *Kelly v. U. S.*, 1 Cir. 1964, 338 F.2d 328, despite the fact that information had long since been furnished to counsel, interrogatories deliberately were not answered and the failure to answer was in the face of a court order to answer certain interrogatories, in an effort by counsel to obtain an unfair advantage at trial. Dismissal was proper there as an exercise of discretion and was affirmed.

14. In *Sweeney v. Anderson*, 10 Cir. 1942, 129 F.2d 756, non-resident plaintiff's counsel died. Eighty-one days elapsed and there was no showing that the plaintiff did anything to secure local counsel. The plaintiff did not appear at the trial nor did his personal attorney—a non-resident—appear. An offer to postpone the trial was ignored. Dismissal properly was affirmed.

15. In *U. S. v. Pacific Fruit & Produce Co.*, 9 Cir., 1943, 138 F.2d 367, at the trial, the United States could not prove its case and had been derelict in obtaining the necessary proof over a period of *two* or *three years;* the U. S. sought a voluntary dismissal. The final dismissal was affirmed as a proper exercise of the trial court's power and discretion.

16. In *West v. Gilbert*, 2 Cir., 1966, 361 F.2d 314, the opinion revealed that the case was two and one-half years old when a sixty day order was entered requiring the plaintiff to go forward to bring the action to a conclusion or to file a note of issue, which was not complied with. The opinion reveals that the case was three and one-half years old when a re-opening or vacating of the default order was sought. Under such circumstances, no abuse of discretion was found in dismissal.

Manifestly, none of the gross situations present in those cases were present here. In practical effect, the only order actually violated concerned actual filing of an agreed pre-trial stipulation on or before a certain date. At no time was there a willful non-appearance. *And the respondents proctor stated he was ready and able to proceed to trial at the time set by the court.* Accordingly, the case is governed by authorities such as *Woodham v. American Cystoscope Company of Pelham, New York*, 5 Cir. 1964, 335 F.2d 551; *Council of Federated Organizations v. Mize*, 5 Cir. 1964, 339 F.2d 898; *Gamble v. Pope & Talbot, Inc.*, 3 Cir. 1962, 307 F.2d 729; *International Harvester Co. v. Rockwell Spring & Axle Co.*, 7 Cir. 1964, 339 F.2d 949; and *Padonini v. Bruchausen*, 2 Cir. 1961, 293 F.2d 546; and cases cited in the opinion of the Fifth Circuit here. The respondent was severely injured. No flagrant violation of the court's orders has been shown. If there were some dereliction, a conditional order of dismissal, or some disciplinary action against the proctor, would have been sufficient sanction under the facts of this case. The Fifth Circuit so held in evaluating this record. But the claimant, in admiralty, should not have been conclusively deprived of his day in court, on this record, because of alleged violations of counsel or want of prosecution.

The case had been pending in court only slightly over nine months when dismissed; c.f., *Link v. Wabash R.R. Co.*, supra. The accident itself happened just over a year prior to dismissal. The petitioner was possessed of full information necessary for trial, and complete proposed pre-trial stipulations were available to it on October 30, 1964. No trial delay would have resulted since the respondent was ready to proceed on the scheduled trial date.

The Court below properly held that the trial court abused its discretion in imposing the harsh sanction that it did.

It is thus seen that on a unique and peculiar factual situation the Fifth Circuit Court of Appeals merely reviewed for an abuse of discretion and found one here. The case is totally unlike the other extreme cases in which final dismissal was approved as a proper exercise of discretion. On peculiar facts, the Fifth Circuit in evaluating this record found an abuse of discretion. This decision, therefore, conflicts with nothing. Indeed, the principle of the *Link* case, supra, was recognized.

There is no reason to grant the writ of certiorari in this routine case. No important Federal question was decided and it appears that indeed the trial court did abuse its discretion. In all events, no special reason for granting the writ has been shown and the case presents no substantial or important question to be settled by this court. No new principle of law has been pronounced or no departure from established principles of law or procedure has been shown.

V

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Richard F. Ralph, Esq., Counsel for Petitioner, 510 Northeast Airlines Building, 150 S.E. Second Avenue, Miami, Florida 33131, this 3rd day of June, 1968.

WALTER H. BECKHAM